

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1912

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-1912

UNITED STATES OF AMERICA,

Appellee,

-against-

GEORGE FLORES,

Appellant.

APPENDIX FOR APPELLANT GEORGE FLORES

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

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Indictment 73 Cr. 1140
(A1-A2)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v -

GEORGE FLORES, a/k/a "Jimmy",

Defendant.

INDICTMENT

73 Cr-1140

COUNT ONE

The Grand Jury charges:

On or about the 23rd day of August, 1973, in the Southern District of New York, GEORGE FLORES, a/k/a Jimmy, the defendant, unlawfully, wilfully and knowingly did possess a firearm, to wit, a sawed-off Ithaca 12 gauge shotgun, serial number 660743691, which firearm was not registered to him in the National Firearms Registration and Transfer Records.

(Title 26, United States Code, Sections 5861(d) and 5871.)

COUNT TWO

The Grand Jury further charges:

On or about the 23rd day of August, 1973, in the Southern District of New York, GEORGE FLORES, a/k/a Jimmy, the defendant, unlawfully, wilfully and knowingly did possess a firearm, to wit, a sawed-off Ithaca 12 gauge shotgun, serial number 660743691, made in violation of law, to wit, Title 26, United States Code, Section 5822.

(Title 26, United States Code, Sections 5861(c) and 5871.)

COUNT THREE

The Grand Jury further charges:

On or about the 23rd day of August, 1973, in the Southern District of New York, GEORGE FLORES, a/k/a Jimmy, the defendant, unlawfully, wilfully and knowingly

ARK:lg
73-2772
n-318

did transfer a firearm, to wit, a sawed-off Ithaca 12 gauge shotgun, serial number 660743691, in violation of the provisions of Title 26, United States Code, Sections 5811 and 5812, to wit, without having filed with the Secretary of the Treasury and his delegate a written application to transfer and register said firearm to the transferee and without having secured the approval of the Secretary of the Treasury and his delegate for the transfer and registration of said firearm to the transferee, and without having paid the tax due and payable on the transfer of said firearm.

(Title 26, United States Code, Sections 5861(e) and 5871.)

FOREMAN

PAUL J. CURRAN
United States Attorney

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Docket Sheets 73 Cr. 1140
(A3-A4)

JUDGE ~~LEVEL~~

JUDGE ~~STEWART~~ **STEWART**

73 CRIM. 1140

D. C. Form No. 100

CRIMINAL DOCKET

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U. S.:

Alan R. Kaufman, AUSA

264-6433

GEORGE FLORES a/k/a Jimmy

6-21-74
on ct. 1+2 only
ct. 3 open.

For Defendant:

Daniel Meyers, Esq.

351 Broadway

New York, N.Y.

ABSTRACT OF COSTS

AMOUNT

CASH RECEIVED AND DISBURSED

DATE

NAME

RECEIVED

DISBURSED

12)

Fine,

Clerk,

Marshal,

Attorney,

~~Commissioner's Office~~ T. 26

Witnesses, 5861(d),(c),(e)&5871

Possession of unregis. sawed-off shotgun(Ct.1)

Possess. of illegally made sawed-off shotgun(Ct2)

Unlaw. transfer of sawed-off shotgun.(Ct.3)

(Three Counts)

DATE

PROCEEDINGS

2-21-73 Filed indictment.

2-27-73 Deft.(atty. present) Pleads not guilty. Bail continued (\$10,000.P.R.B. secured by \$1,000. cash. Motions returnable in 10 days. Case assigned to Judge Stewart for all purposes. Carter, J.

5-9-74 Filed Notice of Readiness for Trial.

5-9-74 Filed Notice of Appearance of Daniel L. Meyers Esq.

5-9-74 Filed Deft's Motion to dismiss Indict, Denied - Trial Adjourned to 5/13/74 - Stewart, J.

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DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
5-14-74	Jury Trial begun before Stewart, J.		
5-15-74	Trial continued		
5-16-74	Trial continued		
5-17-74	Trial continued and concluded. Jury finds Deft. GUILTY on Cts. 1 & 2 unable to reach a verdict on Ct. 3. Court declares a mistrial as to Ct. 3 only. P.S.I. ORDERED. Sentence adjourned to 6/21/74 10AM. Rm. 1305. Deft. REMANDED in lieu of bail previously fixed at \$10,000. P.R.B. sec. by \$1,000. CASH - STEWART, J.		
May 15-74	Filed Stipulation of Govt. that if Mr. Theodore Shaw were called to testify, his testimony would be as indicated...		
5-31-74	Filed Copy of CJA 21 approving payment of Interpreter - Stewart, J.		
6-7-74	Filed CJA 21 Authorization for Transcript Approving payment - STEWART, J.		
6-21-74	Filed JUDGMENT (atty present) It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO YEARS on each of counts 1 and 2 to run concurrently with each other. Deft. to be given credit for time already served - STEWART, J. (copies issued)		
6-25-74	Filed Govt's Requests to Charge		
6-25-74	Filed Govt's Supplemental Requests to Charge		
6-25-74	Filed Government Memorandum of Law		
6-25-74	Filed Deft's Requests to Charge		
6-25-74	Filed Govt. Order that U.S. Atty's office for the District of Puerto Rico use official court reporter immediately transcribe testimony of Rafael Martinez given on 10/25/73 STEWART, J.		
Jun-27-74	GEORGE FLORES - Filed defendants notice of appeal to the USCA for the 2nd Circuit from judgment of conviction entered on 6-21-74 - copies mailed to deft. and US Atty.		
7-11-74	Filed Remand with Marshal's return dtd 5/17/74		

7-16-74 Filed transcript of proceedings dtd MAY 15 16 17 1974

7-16-74 Filed transcript of proceedings dtd JUNE 21 1974
RAYMOND F. BURCHARDT, Clerk

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Charge of the Court
(A5-A28)

CHARGE OF THE COURT

THE COURT: (Stewart, J.) Good morning, ladies and gentlemen. We have now reached the point in this trial when you are about to enter upon your final functions as jurors to act as judges of the fact issues. You are to discharge your final duty in an atmosphere of complete fairness and impartiality and to appraise the evidence calmly and deliberately and, as was emphasized by me when you were selected as jurors, without the slightest trace of sympathy, bias or prejudice for or against the government or the defendant as parties to this controversy.

The fact that the government is a party, that the prosecution is brought in the name of the United States of America, entitles it to no greater consideration than that afforded to any other party. And, by the same token, entitles it to no less consideration. All parties, the government and the defendant, stand as equals before the bar of justice.

Up to now your duty has been, and you have performed it I believe admirably well, to listen to the testimony and to follow the evidence. It has been evident to me and I am sure it has to counsel, that you have not only been attentive but that you have an awareness of the facts and are fully equipped to carry out your final function.

AS

Your final role is to decide the issues of fact. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses. You resolve such conflicts as there may be in the evidence and you draw such inferences as may be warranted by the facts as you find them.

I shall later refer to how you determine the credibility of witnesses.

My function at this point is to instruct you as to the law and it is your duty to accept the law as I state it to you in these instructions. With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel, either for the government or the defendant may have said, whether in a question, in argument or in summation, is not evidence and is not to be substituted for your own recollection of the evidence.

So also anything that I may have said during the trial or may refer to during the course of these instructions as to any matter in evidence is not to be taken in lieu of your own recollection.

The overruling or sustaining of objections whether made by defense counsel or government counsel, is not to be considered by you in any respect. Counsel not only have the right, but it is indeed their duty on the offer of certain

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evidence, to press whatever legal objections there may be to its admission. They are simply performing their duty on behalf of their clients.

Generally speaking, there are two types of evidence from which a jury may properly find the truth as to the facts of the case. One is direct evidence, such as the testimony of an eye witness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence but simply requires that the jury find the facts in accordance with all of the evidence in the case, both direct and circumstantial.

We have a rather common example that we use in this court to inform the jury about the difference between direct and circumstantial evidence.

Let's assume that when you came into the courtroom this morning you could see it was a nice day out, the sun was shining, so that you had direct evidence that it was a nice day. Now, let's assume that we are in a courtroom which has no windows in it and about this time, after having been in this courtroom for a little while, you saw a spectator come into the courtroom with a hat in his hand which was dripping wet.

After a few minutes, you saw another spectator come

A7

1 AR 17

2 in with a raincoat and an umbrella and both were dripping wet.
3 You don't know that the weather has changed, but that is
4 circumstantial evidence from which you can infer that it has
5 begun to rain outside, or it has been raining outside.

6 As I have said, the law recognizes no distinction
7 between direct and circumstantial evidence, so long as you
8 find the facts in accordance with all of the evidence in the
9 case, both direct and circumstantial.

10 Under our law all persons charged with the com-
11 mission of a crime are presumed to be innocent until their
12 guilt has been established by competent evidence beyond a
13 reasonable doubt. You are thus to begin your consideration
14 of this case with the presumption that the defendant, although
15 accused, is innocent..

16 When a person is charged with the commission of a
17 crime, he is not bound to prove that he did not commit that
18 crime. Under our system, the government must prove that he
19 did commit it. The defendant here is entitled to rest upon
20 the presumption of innocence in his favor and the burden of
21 overcoming his presumption of innocence rests upon the govern-
22 ment.

23 Thus, the defendant is not required to testify or
24 even to introduce any evidence in his own behalf. He may
25 chose to rely only on the evidence brought out on cross-
examination of the government's witnesses.

1 AR 18

2 This burden of establishing the guilt of the
3 defendant beyond a reasonable doubt which rests upon the
4 government never shifts throughout the entire trial. The
5 presumption was in the defendant's favor at the start of the
6 trial, it is in his favor as I address you now, and it remains
7 in his favor during your deliberations in the juryroom.

8 It is removed only if and when all twelve of you
9 are satisfied beyond a reasonable doubt of the guilt of the
10 defendant of the offenses charged.

11 As I have just told you, the law provides that in
12 any criminal matter the defendant is under no obligation to
13 testify or indeed to come forward with any evidence since the
14 burden of proving a violation of law is solely and exclusively
15 on the government. I therefore charge you that you may not
16 consider in any way the fact that the defendant has chosen
17 not to testify in this case. That is his right under the law,
18 and you are not permitted to speculate on the reasons why he did
19 not testify, nor may you draw any inference of any kind from
20 his decision not to take the stand; nor must it enter into
21 your deliberations in any manner.

22 His decision is a choice shared by every defendant
23 in every criminal trial in this country and may in no way be
24 used by you against him as a substitute for or as a supplement
25 to the evidence before you.

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AR 19

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If a potential witness could have been called and neither side called him, then you may infer that the testimony of the absent witness might have been unfavorable to the government or to the defendant, or to both of them. But, on the other hand, it is equally within your province to draw no inference at all from the failure of either side to call a witness. In this regard, however, you should bear in mind however there is no duty upon the government to call a witness whose testimony would be merely cumulative of testimony already in evidence, which testimony has not been rebutted.

And, of course, as I have told you, the defendant has no obligation to call any witnesses or to introduce any evidence at all.

Now, as I have said, the presumption of innocence is removed only if and when you are satisfied beyond a reasonable doubt of the guilt of the defendant of the offenses charged. What is a reasonable doubt?

The words almost define themselves. A reasonable doubt is a doubt founded in reason and arising out of the evidence in the case, or the lack of evidence. It means a doubt which a reasonable person has after carefully weighing all the evidence. A reasonable doubt is a doubt which appeals to your reason, your judgment, your common sense, your experience.

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AR 20

1 It is not caprice, whim, speculation. It is not
2 an excuse to avoid the performance of an unpleasant task.
3 It is not sympathy for a defendant.

4 On the other hand, a defendant may not be convicted
5 on mere suspicion, conjecture or possibility.

6 If, after a fair and impartial consideration of
7 all the evidence you can candidly and honestly say that you
8 are not satisfied of the guilt of the defendant, that you
9 do not have an abiding conviction of the defendant's guilt
10 which amounts to a moral certainty, in sum, if you have such
11 a doubt as would cause you as prudent persons to hesitate
12 before acting in matters of importance to yourselves, then
13 you have a reasonable doubt and, in that circumstance, it is
14 your duty to acquit.

15 But a reasonable doubt may arise not only from
16 the evidence produced but from the lack of evidence. A rea-
17 sonable doubt may also arise from the evidence brought out
18 on cross-examination of witnesses for the government. As I
19 have previously told you, the law does not impose upon a
20 defendant the duty of producing any evidence.

21 If, however, after such a fair and impartial con-
22 sideration of all the evidence, you can candidly and honestly
23 say that you have an abiding conviction of a defendant's
24 guilt, such a conviction as you would be willing to act upon
25

All

1 AR 21

2 in matter of importance in your personal affairs, then you
3 have no reasonable doubt and, under that circumstance, it is
4 your duty to convict.

5 One final word on this subject. Reasonable doubt
6 does not mean a positive, certain, or beyond all possible
7 doubt. If that were the rule few persons, however guilty,
8 would be convicted. It is practically impossible for a
9 person to be absolutely sure and completely convinced of any
10 controverted fact which by its nature is not susceptible of
11 mathematical certainty.

12 In consequence, the law in a criminal case is that
13 it is sufficient if the guilt of a defendant is established
14 beyond a reasonable doubt, not beyond all possible doubt.

15 This case must be decided within the framework of
16 the charge made against the defendant as contained in the
17 indictment. As I have already instructed you, the indictment
18 is merely a written accusation, a charge. The indictment
19 neither creates any adverse presumption or permits any in-
20 ference or suspicion of guilt; nor does it detract in any
21 degree from the presumption of innocence with which the law
22 surrounds the defendant.

23 In short, the fact that a grand jury has returned
24 an indictment in this case is not evidence at all and you may
25 not give that fact any weight whatever in your deliberations.

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AR 22

The indictment charges violations of various sections of Title 26 of the Gun Control Act of 1968. The indictment in this case contains three separate counts or charges, each of which specifies a distinct crime.

In capsule form the crimes charged against the defendant are, count one, the crime of possessing an unregistered firearm; count two, the crime of possessing an illegally made firearm; and count three, the crime of transferring that firearm to another person without registering the transfer as required by law.

You must consider each count separately and you must return a separate verdict of guilty or not guilty as to each of these three counts in the indictment.

Count one states that on or about the 23rd day of August, 1973, in the Southern District of New York, George Flores, also known as Jimmy, the defendant, unlawfully wilfully and knowingly did possess a firearm to wit, a sawed off Ithaca 12 gauge shot gun, serial number 660743691, which firearm was not registered to him in the National Firearm Registration and Transfer records.

Count two charges that on or about the 23rd day of August, 1973, in the Southern District of New York, George Flores, also known as Jimmy, the defendant, unlawfully, wilfully and knowingly did possess a firearm, to wit, a

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2 beyond a reasonable doubt:

3 One, that the weapon described in count one was a
4 firearm within the definition of the Act.

5 Two, that on or about August 23, 1973, the firearm
6 was possessed by the defendant.

7 Three, that the firarm was not registered to him
8 in the National Firearm Registration and Transfer records;

9 and, four, that the defendant's possession of the
10 firearm was wilful and knowing.

11 The indictment specifies the firearm involed in
12 count one as well as in the other two counts as a sawed off
13 shot gun. The statutory definition of the term firearm in-
14 cludes, and now I quote, "A shot gun having a barrel of less
15 than 18 inches in lenght."

16 The term shot gun means, "a weapon designed or
17 redesigned or made or remade and intended to be fired from the
18 shoulder and designed or redesigned and made or remade to use
19 the energy of the explosive in a fixed shot gun shell to fire
20 through a smooth bore either a number of ball shot or a single
21 projectile for each pull of the trigger", and shall include
22 any such weapon which may be restored to fire a fixed shot gun
23 shell.

24 Therefore, the first element of count one is
25 not proven unless you find beyond a reasonable doubt that

A14

1 AR 25

2 the shot gun which is in evidence was a shot gun as that term
3 is defined in the act.

4 The second element that must be proven by the
5 government beyond a reasonable doubt is that of possession.
6 The law recognizes two types of possession, actual possession
7 and constructive possession.

8 A person who knowingly has direct physical con-
9 tact and control over a thing at a given time is in actual
10 possession. A person who although not in a dual possession
11 knowingly has the power and the intention at a particular
12 time to exercise dominion and control over a thing, either
13 directly or through another person or persons, is then in
14 constructive possession of it.

15 If you find the defendant from the evidence,
16 beyond a reasonable doubt, had actual or constructive possess-
17 ion of the firearm described in the indictment, then you may
18 find that such firearm was in the possession of the defendant.
19 within the meaning of the word possession as used in this
20 statute.

21 The third element of the crime alleged in count
22 one which the government must prove beyond a reasonable
23 doubt is that the firearm was not registered in the name of
24 the defendant in the National Firearm Registration Records
25 maintained as required by law.

A15

34.
1 AR 26

2 The proof of registration or non-registration
3 may be established by the official records introduced at
4 trial.

5 Finally, you will recall in stating the elements
6 I said that before you can convict the defendant you must
7 find as one of the elements he possessed the firearm knowingly
8 and wilfully. What do we mean by these words?

9 First, let me instruct you as to what the words
10 do not mean. They do not mean that the government has to show
11 that the defendant knew he was breaking the law before he can
12 be convicted of a crime. They also do not mean that the gov-
13 ernment has to show the defendant intended to profit at the
14 expense of the government or any other person.

15 These words knowingly and wilfully mean de-
16 liberately or intentionally, as opposed to any inadvertence
17 or accident on the part of the defendant. You are not re-
18 quired to find that the defendant specifically knew that the
19 firearm was unregistered by the government must prove beyond
20 a reasonable doubt that the defendant knew that the instrument
21 he possessed was a firearm.

22 Count two of the indictment charges a violation
23 of Title 26, United States Code, Section 5861(c) which pro-
24 vides in part that "it is unlawful for any person to possess
25 a firearm made in violation of the provisions of this chapter."

A16

1 AR 27

2 To make a firearm is defined as altering a fire-
3 arm. The defendant is charged in count two with possessing
4 a firearm which was made in violation of law.

5 Section 5822 of Title 26 stated in count two
6 sets forth the required procedures in making a firearm. In
7 short, it requires that an application to make the firearm be
8 filed with the Secretary of the Treasury.

9 In order to find the defendant guilty of the
10 offense charged in count two, you must find that the government
11 has proven the following elements beyond a reasonable doubt:

12 One, that the weapon described was a firearm and
13 that on or about August 23, 1973, a firearm was possessed by
14 the defendant.

15 Two, that the firearm had been made in violation
16 of Title 26, United States Code, Section 5822, in that no
17 application was made.

18 Three, that the defendant's possession of the
19 firearm was wilful and knowing.

20 The first element, that of possession I have al-
21 ready instructed what the government must prove. You will
22 recall that the government must prove either actual or con-
23 structive possession. YOU will also recall the definition of
24 a firearm and a shot gun.

25 The second element, that of failure to make an

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AR 28

application, may be established by the official records introduced in evidence.

As to the third element, that of wilfully and knowingly possessing a firearm, I previously instructed you what that phrase means; it means deliberately or intentionally, rather than inadvertantly or accidentally.

It is not necessary for the government to show that the defendant possessed the firearm knowing that an application to make it had not been filed. With respect to this charge, the defendant's possession of the firearm must have been deliberate and not inadvertance.

Count three of the indictment charges a violation of Title 26, United States Code, Section 5861, which provides that it is unlawful for any person to transfer a firearm in violation of the provisions of this section.

The provisions with respect to transferring the firearm are contained in Sections 5811 and 5812 of Title 26, United States Code. These sections require the transferor or a firearm to pay a tax and to file a written application with the Secretary of the Treasury before transferring the firearm.

In order to find the defendant guilty of the offense charged in Count three, you must find that the government has proved the following four elements beyond a reasonable doubt:

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1 AR 29

2 One, that the weapon described was a firearm within
3 the definition of the Act. I have previously told you with
4 respect to this element what the law is.

5 The government has stated that the weapon in evidence
6 is the basis for all three counts.

7 Secondly, that on or about August 23, 1973, the
8 defendant transferred the firearm to Agent Rafael Martinez.

9 Third, that the defendant did so knowingly and wil-
10 fully as I have defined those terms.

11 Finally, that the defendant had not applied to
12 transfer the firearm to Rafael Martinez.

13 The question of the failure to make application with
14 respect to the firearm allegedly transferred by the defendant
15 may be established by official records introduced in evidence.

16 You as jurors are the sole judges of the credibility
17 of the witnesses and the weight that their testimony deserves.
18 You should carefully scrutinize the testimony given, the circum-
19 stances under which each witness has testified and every matter
20 in evidence which tends to indicate whether the witness is
21 worthy of belief.

22 Consider each witness' intelligence, state of mind,
23 motive, demeanor and manner while on the witness stand. Con-
24 sider also any relationship each witness may bear to either
25 side of the case, the manner in which the witness may be

A19

1 AR 30

2 affected by the verdict and the extent to which, if at all,
3 each witness is either supported or contradicted by other
4 evidence.

5 Any inconsistencies or discrepancies in the testi-
6 mony of a witness or between the testimony of different wit-
7 ness may or may not cause you to discredit such testimony.
8 Innocent misrecollection, like failure of recollection, is
9 not an uncommon experience. In weighing the effect of any
10 discrepancy consider whether it is pertinent to matter of im-
11 portance or an unimportant detail; and whether the discrepancy
12 results from innocent error or wilful falsehood.

13 If you find ~~that~~ any witness has testified falsely
14 you have two options. You can either reject all of that wit-
15 ness' testimony on the ground that it is all tainted by false-
16 hood and that none of it is worthy of belief. Or you can
17 accept that part which you believe to be credible and reject
18 only that part which you believe to be false.

19 In searching for the truth, you must use your plain
20 every-day common sense and experience in determining whether
21 a witness has testified frankly, candidly and honestly.

22 In other words, you act precisely as you would in
23 your own affairs when called upon to reach or make an important
24 decision concerning the truthfulness of a statement made to
25 you by another upon which you are asked to rely.

A20

2 The mere fact that a witness is employed by the
3 government does not entitle such witness' testimony to more
4 weight or credence than that of any other witness. You must
5 judge the credibility of all witness, including the government
6 employees, and consider their interest, if any, in determining
7 the weight to be given to their testimony.

8 The testimony of an informer who provides evidence
9 against the defendant for pay, must be examined and weighed
10 by you with greater care than the testimony of an ordinary
11 witness. The jury must determine whether the informer's testi-
12 mony has been affected by his interest.

13 All evidence relating to any verbal admissions or
14 statements claimed by the government to have been made by the
15 defendant outside of court may be considered by you. Under no
16 circumstances may you find the defendant guilty solely on the
17 basis of his statements made outside of this courtroom.

18 Before you may consider any such alleged statements
19 attributable to the defendant, there must be independent evi-
20 dence that the crime charged had been committed by him. I
21 further charge you that you must also consider whether the
22 person relating the defendant's alleged statement is to be
23 believed. This is consistent with the necessity of assessing
24 the credibility of all testimony.

25 Now, we have had some discussion about entrapment

A21

AR 32

and here I want to remind you that the law is what I am telling you it is and you are bound by what I tell you the law is and it is not what any of the lawyers may have said about what it may or may not be. By what I am telling you, however, is for your purposes the law and you must accept what I tell you.

The defendant has raised the defense of entrapment in this case. This defense is applicable only to the third count, the transfer count.

It is common ground that the conduct with which the defense of entrapment is concerned is the manufacture of crime by law enforcement officials and their agents.

The government cannot be permitted to instigate the commission of a criminal offense in order to prosecute someone for committing it. It is to prevent this situation from occurring in the administration of criminal justice that the defense of entrapment exists.

When the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induct its commission in order that they may prosecute, then the defendant must be acquitted.

But the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution, for

1 AR 33

2 it is only when the government's deception actually implants
3 the criminal design in the mind of the defendant that the
4 defense of entrapment comes into play.

5 Here the defendant contends that he was free of any
6 criminal purpose; that he was induced to engage in the conduct
7 charged against him by the activities and statement of govern-
8 ment agents.

9 The government contends that the conduct was
10 initiated by and was the act of the defendant, and that the
11 government through its agent was merely afforded the opportuni-
12 ty to commit the offense.

13 The defendant, to raise the defense of entrapment,
14 must adduce some evidence that the illegal conduct was in-
15 itiated by the government's agent and that he was thereby
16 induced to commit the offense.

17 If you do not find such inducement, there can be
18 no entrapment and that would end the defense of entrapment.

19 If, however, the defendant has carried his burden
20 and produced some evidence that the government initiated the
21 criminal action, then the government must prove beyond a rea-
22 sonable doubt that the inducement was not the cause of the
23 crime; that the defendant was ready and willing, without
24 persuasion to commit the crime. To sustain its rebuttal of the
25 defense of entrapment, the government must satisfy you that

A23

2 in fact its agent did not induce an innocent person.

3 Thus, if the prosecution has satisfied you that
4 the defendant was ready and willing to commit the offense
5 charged, the fact that the government agent afforded the
6 defendant a convenient or favorable opportunity for the crimin-
7 al conduct is no defense of entrapment.

8 On the other hand, if you have a reasonable doubt
9 whether the defendant had a previous intent or purpose to
10 commit the offense, and did so only because he was induced or
11 persuaded to do so by the government agent, then it is your
12 duty to acquit.

13 Although a number of witnesses appeared on behalf
14 of the government during the course of this trial and although
15 some documents were introduced into evidence by the government,
16 the mere number of witnesses or the amount of documents has
17 no relation to the burden of proof which I alluded to and it
18 is to have no effect upon your deliberations.

19 Your primary concern is the quality and the nature
20 of the evidence, not the quantity. You must not permit the
21 number of witnesses and documents introduced here to overwhelm
22 your judgment.

23 It is your duty to determine what weight, if any,
24 is to be given the case and the weight of the evidence is not
25 determined by the number of witnesses or the quantity of

A24

documents.

The most important part of the case is the part which you now as jurors are about to play, because it is for you and you alone to decide whether the defendant is guilty or not guilty of the offenses charged.

You must try the issues that have been presented to you according to the oath that you have taken as jurors and in which you promised that you would well and truly try the issues in this case and render a true verdict.

You must not allow emotion, fear, prejudice or bias or sympathy to interfere with your calm deliberation. The just determination of this case is important to the government, to the defendant and to the public.

Under your oath as jurors you must decide this case solely in accordance with the evidence, the facts as you find them to be and the law as I have instructed you. If the government has filed to prove beyond a reasonable doubt each and every element of the offenses charged, your sworn duty is to bring in a verdict of not guilty. But if the government has carried its burden of proving beyond a reasonable doubt each and every element of the offenses charged, it is your sworn duty to bring in a verdict of guilty.

Under your oath you cannot allow the consideration of punishment which may be imposed upon the defendant if con-

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2 victed to influence your verdict in any way, or in any sense
3 to enter your deliberations. The duty of imposing sentence
4 rests exclusively upon the court. You are to decide the case
5 on the evidence and the evidence alone, and you must not be
6 influenced by any assumption, conjecture or sympathy.

7 Your verdict must represent the considered judgment
8 of each juror. To return a verdict as to any of the three
9 counts, it is necessary that each juror agree thereto. Your
10 verdict, whether guilty or not guilty, must be unanimous as to
11 each count of the indictment.

12 You are to render a separate unanimous verdict as to
13 each count. It is your duty as jurors to consult with one
14 another and to deliberate with a view toward reaching an
15 agreement. Each juror should listen to all of the arguments
16 of his fellow jurors, but you must not surrender your con-
17 scientious convictions solely because of the opinions of your
18 fellow jurors or because you are outnumbered.

19 Each of you must decide the case for yourselves
20 but do so only after an impartial consideration of the evidence
21 with your fellow jurors. In the course of your deliberations
22 do not hesitate to reexamine your own views and to change your
23 opinion if it is erroneous. But do not surrender your honest
24 convictions as to the weight or effect of the evidence solely
25 because of the opinion of your fellow jurors or for the mere

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2 purpose of returning a verdict.

3 Your sole interest is to ascertain the truth from
4 the evidence in the case.

5 In the event you come to a point where you need the
6 law explained to you further, or there is a point of a particu-
7 lar witness' testimony that you want reread, or a particular
8 exhibit which you want to examine, make that known to me and
9 we will accomplish that. Mr. Foreman, in that event, I would
10 like you to write out on a piece of paper whatever it is that
11 the jury wants and hand it to the marshal who will get it to
12 me and we will deal with it.

13 No member of the jury should attempt to communicate
14 with the court in any other manner than by a signed writing.
15 Bear in mind that you are not to reveal to any person how you
16 stand numerically or any other way on the question of the
17 guilt or innocence of the defendant until after you have
18 reached a unanimous verdict and reported to the court.

19 If after a conscientious and careful consideration
20 of all of the evidence and all of the views of your fellow
21 jurors you are still unable to reach a unanimous verdict,
22 you may communicate that fact only to the court. But even
23 at that time you should not communicate to the court how you
24 stand numerically.

25 May I see counsel?

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2 (At the side bar.)

3 MR. MEYERS: Your Honor, I have no exceptions other
4 than previously taken here in chambers and whatever requests
5 I amde, I will make again now.

6 THE COURT: All right. I will rule as I have before.

7 MR. KAUFMAN: Nothing, your Honor.

8 THE COURT: All right.

9 (In open court.)

10 (Alternates excused.)

11 THE COURT: My intention, ladies and gentlemen,
12 is that I will ask that you have lunch sent in for you. The
13 marshals and my clerk will arrange to take your orders for
14 lunch.

15 All right, swear the marshals.

16 (Marshals sworn by the clerk.)

17 (Jury retired to deliberate at 11:40 a.m.)

18 (The following took place in open court, 12:05 p.m.).

19 THE COURT: Mr. Meyers, I will read the note before
20 your client gets here.

21 MR. MEYERS: That is fine, your Honor.

22 THE COURT: "Please can we have a copy of the three
23 charges against the defendant."

24 I take it that means the indictment, and I propose
25 to give it to them.

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